

Supreme Court of the United States

OCTOBER TERM, 1941

No.

SIMON DURLACHER, *Petitioner,*

v.

HELEN S. DURLACHER, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF FACTS IN SUPPORT OF ARGUMENT.

Only those facts are here recited which are deemed necessary to cover the points raised in the accompanying petition and argued in this brief.

The separation and maintenance decree between the petitioner and respondent was entered February 7, 1934 by the Supreme Court of New York with personal service upon the petitioner there and general appearance by him therein, and without fraud (R. 20, 21, 25). This decree is conceded to have been entirely valid within New York State. The divorce decree between the petitioner and respondent was entered April 14, 1939 in the Second Judicial District Court of Nevada, at the domicil of the petitioner and while the respondent was domiciled in the State of New York. She was personally served with process within the State of New York but not within the State of Nevada, and she did not

appear in said suit either generally or specially (R. 19, 21, 26, 27). It is conceded "that all proceedings, from the commencement of said action, up to and including the entry of the final decree therein, were due and regular and in full and faithful compliance with the laws of the State of Nevada", and consequently that it was and is entirely valid within the State of Nevada (Stipulation of Fact, R. 22). The money judgments which formed the basis for the action by the respondent against the petitioner in the District Court of the United States for the District of Nevada were entered in the New York Supreme Court after the entry of the Nevada divorce decree (R. 5, 6, 7, 8, 9).

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit proceeds upon the theory that the full faith and credit clause of the United States Constitution (Article 4, Section 1) and its implementing statute (28 U. S. C. A. 687) required the District Court of the United States for the District of Nevada to give to the New York judgment for $1,666.66 the same faith and credit given to it in New York (Amended Opinion C. C. A. par. 7, R. 75, 76) that since said New York judgment was not subject to "collateral attack" in New York, it was not subject to such attack in Nevada (Opinion C. C. A. par. 11, R. 77, 78, and amended opinion R. 81, 82) and that this case is not "one of conflict of laws under *Klaxon Company* v. *Stentor Electric Company*", in which the Nevada law in point should be applied by the District Court of the United States for the District of Nevada (Opinion C. C. A. par. 14, R. 79).

It is submitted that the fallacy of this argument lies in the assumption and premise that if the New York judgment is not subject to collateral attack in New York, it is not subject to such attack in Nevada. In cases involving the obligatory recognition in one State of a judgment rendered in another, this Court has consistently held that the Courts of the State in which recognition is sought may always inquire into

the matters of jurisdiction and fraud in the suit in the first State, and may properly refuse to recognize such a judgment if jurisdiction was absent or if fraud was present in the adjudication. *Haddock* v. *Haddock*, 201 U. S. 562, 50 L. Ed. 567, 26 S. Ct. 525; *Cheever* v. *Wilson*, 9 Wall. 108, 19 L. Ed. 604; *Andrews* v. *Andrews*, 188 U. S. 14, 47 L. Ed. 366, 23 S. Ct. 237; *Atherton* v. *Atherton*, 181 U. S. 155, 45 L. Ed. 794, 21 S. Ct. 544.

Also, this Court has frankly recognized, particularly in recent years, that "the full faith and credit clause is not an inexorable and unqualified command", but that it "leaves some scope for state control within its borders of affairs which are peculiarly its own". *Pink* v. *A. A. A. Highway Express, Inc.*, 86 L. Ed. (adv.) 200, at page 204, and cases there cited, beginning with *Alaska Packers Asso.* v. *Industrial Accident Commission*, 294 U. S. 532, 79 L. Ed. 1044, 55 S. Ct. 518.

Of course this Court has always regarded the married or unmarried status of its citizens to be a matter peculiarly within the control of the State of citizenship. *Haddock* v. *Haddock, Cheever* v. *Wilson, Andrews* v. *Andrews, Atherton* v. *Atherton, supra.*

Yet the Court below has treated the full faith and credit clause in this case as though it were a rule of exact science to be rigidly applied without limitation or qualification of any kind beyond what might be available in the State rendering the judgment which was sued on in the second State. This, of course, means that there could not possibly be any limitations or qualifications at all, because the question of full faith and credit could never arise in the State in which the original judgment was entered.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals for the Ninth Circuit presents a constitutional law and conflict of laws question of general importance.

The decision of this case does not depend upon any determination of facts or sufficiency of evidence upon which those facts are predicated and which would not be subject to review on certiorari. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 68 L. ed. 413.

There is no question here of the domicil of either party with its attendant factual questions of residence and intention. Nor is there any factual question of service or appearance either general or special and, if special, of peculiar facts which would make it general. The question here is whether the Court below erred in not applying the Nevada case law that a valid Nevada divorce decree had destroyed the marriage status of the parties and had rendered nugatory a previous New York decree for separation and maintenance and a New York money judgment based thereon when suit was brought upon that money judgment in the United States District Court for the District of Nevada. That question may arise in any situation where a valid divorce decree is rendered in one State which is inconsistent with a valid decree of separation and maintenance previously rendered in another State.

Obviously, there is no jurisdiction in a Court of the first State to render a maintenance judgment predicated upon married status if that status has been destroyed. Whether such destruction has occurred by reason of a divorce decree of a court of another jurisdiction is a matter of conflict of laws, and if the case is within the United States it is also a matter of constitutional law by reason of the application of the full faith and credit clause. The question has not been specifically decided by this Court. It has however re-

ceived consideration in many States which hold as does Nevada that the later divorce decree renders the previous separation decree nugatory. Those States and the leading cases therein are:

Nevada—*Herrick* v. *Herrick*, 55 Nev. 59, 25 P. (2d) 378

California—*Cardinale* v. *Cardinale*, 68 P. (2d) 351
Simpson v. *Simpson*, 131 P. 99
Smith v. *Superior Ct.*, 68 P. 100
Harlan v. *Harlan*, 154 Cal. 341, 98 P. 32

Alabama—*Harrison & Saunders* v. *Harrison*, 20 Ala. 629

Michigan—*McCullough* v. *McCullough*, 168 N. W. 929

Kansas—*McCormick* v. *McCormick*, 107 P. 546

Kentucky—*Hughes* v. *Hughes*, 278 S. W. 121

Illinois—*Bushnell* v. *Cooper*, 289 Ill. 260, 124 N. E. 521
Knowlton v. *Knowlton*, 39 N. E. 595
Hazard v. *Hazard*, 197 Ill. App. 612

New York—*Burton* v. *Burton*, 135 N. Y. Supp. 248
Tonjes v. *Tonjes*, 43 N. Y. Supp. 1028

The Court below, therefore, has not only declined to apply the Nevada law concerning this conflict of laws question but has refused to follow the State authorities indicated above concerning the proper conflict of laws rule. It has done so on the ground that it regards the full faith and credit clause as an inexorable and unqualified command. Whether such a decision of the problem in the important field of marital status is correct, is, it is respectfully submitted, a question of general importance within the meaning of Rule 38, par. 5(c) of the Rules of this Court.

II.

The judgment of the court below involves the construction and application of the Constitution and a statute of the United States in which settlement by this Court is required.

To borrow a phrase from the opinion of this court in *Klaxon* v. *Stentor Electric Mf'g. Co., Inc.*, 85 L. ed. (adv.) 969 at page 970, there is a "conflict of approach to the problem" here involved between the opinion of the United States Circuit Court of Appeals for the Ninth Circuit in the instant case and the United States Court of Appeals for the District of Columbia in *Bloedorn* v. *Bloedorn*, 76 F. (2d) 812 (certiorari denied 295 U. S. 746), and in *Curley* v. *Curley*, 120 F. (2d) 730 (certiorari denied October 1941).

In the *Bloedorn* case the wife had obtained a decree of separate maintenance in the Supreme Court of the District of Columbia. The husband had later obtained a decree of divorce in Virginia in which suit the wife had appeared. In a later suit in the District of Columbia to recover maintenance money in arrears, the Wife contended that the Virginia decree could not operate of its own force to extinguish the prior decree for maintenance, and that the decree giving it that effect regarding maintenance then past due was erroneous. The Court of Appeals for the District of Columbia said at page 814:

> "While the decree appealed from in form merely dismisses the motion and discharges a rule in respect to a small amount of alimony then accrued, in legal effect it operates to vacate the provision made for the wife by recognizing that she is no longer a wife because of the Virginia decree, and the Virginia law makes no provision for alimony to a wife against whom a divorce has been granted. *Thompson* v. *Thompson*, 226 U. S. 551, 33 S. Ct. 129, 57 L. ed. 347."

So the later Virginia decree of divorce was held to render void and ineffective in a suit in the District of Columbia a prior decree of a District of Columbia court for separa-

tion and maintenance. The general appearance of the wife in the Virginia divorce suit and the fact that the suit on the maintenance decree was brought in the jurisdiction which rendered that decree are the only differences between that and the instant case. But such appearance or her domicil in Virginia was necessary in order that the Virginia divorce decree be entitled to obligatory extra-territorial recognition under the full faith and credit clause (*Haddock* v. *Haddock, supra; Cheever* v. *Wilson, supra*) but it was not necessary to make that Virginia divorce decree a valid and effective bar in Virginia (*Haddock* v. *Haddock, supra*). And it was not necessary in the instant case to make the Nevada divorce effective in Nevada as against the New York separation decree. Yet, the Court below has held that it was completely ineffective in that regard.

In the *Curley* case, the Court of Appeals for the District of Columbia held that a prior Florida divorce decree rendered at the domicil of the husband but without personal service upon or appearance by the wife there rendered nugatory and ineffective as a matter of conflict of laws, a later maintenance decree rendered in favor of the wife in the District Court for the District of Columbia with a general appearance by the husband there. The only differences between that case and the instant case are that the Florida divorce decree was held to be a bar to a separation suit in another jurisdiction and that the divorce decree came first in point of time. Obviously, if the Florida divorce decree could bar the separation suit in the District of Columbia, the Nevada Divorce decree in the present case should bar the suit in Nevada based upon the New York separation decree. That the divorce decree came first in the *Curley* case is not material. The question in both that case and the instant case was whether the divorce decree severed the marital relation and therefore made ineffective and nugatory from the time of its entry any separation or maintenance decree which had to be based upon the continuation of the marital relation. The question was stated as follows in the

Curley case brief in support of the petition for writ of certiorari (No. 5056, Oct. Term, 1941, typewritten brief *in forma pauperis*, p. 6, par. 2):

> "The fundamental question to be determined is whether or not, under the above quoted section of the District Code, a wife who is a non-resident of the District of Columbia, may maintain an action for maintenance against her husband who is a non-resident of the District of Columbia, where she has succeeded in obtaining personal service of process within that jurisdiction. In determining this question, as a fundamental matter, it was necessary for her to first prove that the respondent was at the time of bringing suit actually her husband, and it was in this way that the effect of the Florida decree was brought before the trial Court; and it was necessary that that Court first determine whether or not the respondent was in fact the husband of petitioner before determining the liability of respondent under the above quoted section."

To summarize, it seems clear that in the *Bloedorn* and *Curley* cases the Court of Appeals for the District of Columbia held in the first case as a matter of constitutional law and in the second case as a matter of conflict of laws, that foreign divorce decrees which were valid where entered rendered nugatory separate maintenance decrees entered at the forum on the ground that the divorce decrees had destroyed the basis for the maintenance decrees, that is, the marital relation. Petitions for certiorari were denied in both of these cases, *supra*. In the instant case the Circuit Court of Appeals for the Ninth Circuit has held that a Nevada divorce decree valid where entered has not rendered nugatory in Nevada a separate maintenance decree entered in New York and sued on in the United States District Court for the District of Nevada. It is, therefore, respectfully submitted that there is at least a conflict of approach to the problem presented between the opinions of the Circuit Court of Appeals for the Ninth Circuit and the Court of Appeals for the District of Columbia, and that it is prob-

ably accurate to say that the cases are directly inconsistent on principle, with the result that the instant case merits review by this Court in order to settle the problem.

III.

The judgment and opinion of the court below fail to give proper effect to applicable decisions of this Court.

The precise question here involved has not been decided by this Court. The case of *Barber* v. *Barber*, 21 How. 582, 16 L. Ed. 226, which has been cited against the petitioner in the courts below holds that a wife who has obtained a decree of separation and maintenance in one state may sue her husband in equity on that decree in a United States District Court in another state on the ground of diversity of citizenship. It is submitted that any language of the opinion in that case which goes beyond that decision is obviously dicta (See notes 39 A. L. R. 640, and 42 A. L. R. 1376) and that such dicta has probably been discredited by the decision of this Court in *Thompson* v. *Thompson*, 226 U. S. 551, 57 L. ed. 347, 33 S. Ct. 129. However, it is submitted that the decision and opinion of the Court below fail to give proper effect to decisions of this Court which are properly applicable, namely, among others:

Haddock v. *Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 S. Ct. 525

Klaxon Co. v. *Stentor Electric Mf'g. Co., Inc.*, 85 L. ed. (adv.) 969

Pink v. *A. A. A. Highway Express, Inc.*, 86 L. ed. (adv.) 200

The leading case of *Haddock* v. *Haddock, supra,* has clearly established the doctrine that a State has the right to adjudicate the status and incidents of status of its own citizens. Its language in this regard is in part as follows, 201 U. S. 562 at page 572:

> "In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Con-

necticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the Court of Connecticut, he being at the time when the decree was rendered domiciled in that State."

It is conceded that the petitioner was at the time of the entry of the Nevada divorce decree and has ever since been domiciled in Nevada and, therefore, a resident and citizen of that State (R. 2, 20, 21, 45, 46, 65). The decree of divorce established the status of the petitioner and the incidents of such status in Nevada (*Haddock* v. *Haddock, supra*), and the Nevada law is that a Nevada decree of divorce renders void and ineffective from the time of its entry a prior decree of maintenance based upon the continuation of the marriage relation (*Herrick* v. *Herrick*, 25 Pac. (2d) 378 (Nev.)).*

The suit in the instant case was brought in the United States District Court for the District of Nevada and this Court has held in *Klaxon Co.* v. *Stentor Electric Mf'g. Co., Inc.*, 85 L. ed. (adv.) 969, extending the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, that the United States Courts must follow the conflict of laws decisions of the Courts of the States in which they sit.

It is submitted that the Nevada Law should have been applied by the Court below and that judgment should have been rendered for the petitioner on the ground that the New York separate maintenance decree had been rendered void and ineffective by the Nevada divorce decree.

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* The law and public policy of Nevada concerning divorce is indicated by the following statutes and cases: Nevada complied laws, Vol. IV Sec. 9468, 9460, as amended, Nevada Statutes, 1931 pg. 14. 161, Nevada Statutes 1929 pg. 18, and Nev. Statutes 1939, pg. 19, Sec. 28, Nev. Com. Laws, Vol. IV sec. 9463 as amended. Nev. Statutes, 1939, pg. 18, Sec. 25, *Walker* v. *Walker*, 45 Nev. 105, 198 Pac. 433, *Lamb* v. *Lamb* (Nev.) 65 Pac. (2d) 872, *Worthington* v. *District Court*, 37 Nev. 212-221, 226, 142 Pac. 230, *Sweeney* v. *Sweeney*, 42 Nev. 431, 179 Pac. 638, especially from page 639-640, Pacific.

This contention is sustained by a very recent decision of this Court, *Pink* v. *A. A. A. Highway Express, Inc.*, 86 L. ed. (adv.) 200, where the Court unanimously said through Mr. Chief Justice Stone at page 204:

> ". . . . But the full faith and credit clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its own. This Court has often recognized that, consistent with the appropriate application of the full faith and credit clause, there are limits to the extent to which the laws and policy of one state may be subordinated to those of another. Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Pacific Employers Ins. Co. v. Industrial Acci. Commission, 306 U. S. 493, 83 L. ed. 940, 59 S. Ct. 629; Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 497, 498, 85 L. ed. 1477, 1481, 61 S. Ct. 1020; see Milwaukee County v. M. E. White Co., 296 U. S. 268, 273, 80 L. ed. 220, 225, 56 S. Ct. 229.
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> "It was the purpose of that provision to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others. But the very nature of the federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others. When such conflict of interest arises it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another. See Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 547, 79 L. ed. 1044, 1052, 55 S. Ct. 518; Pacific Employers Ins. Co. v. Industrial Acci. Commission, 306 U. S. 493, 83 L. ed. 940, 59 S. Ct. 629."

It is respectfully urged that such a conflict exists in this case and that this Court should resolve it by determining how far the full faith and credit clause demands in the

United States District Court for the District of Nevada the qualification or denial of rights asserted under the laws of the State of Nevada by the judicial proceedings of the State of New York.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari in this case complies with the requirements of Rule 38 of this Court, that it presents a question of merit which requires adjudication and settlement by this Court, and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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